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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN A. KNOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether there can be a "lascivious exhibition of the genitals or pubic area" when a child's genitals are scantily covered and a camera focuses on those areas for extended periods in order to produce an image arousing to pedophiles.

2. Whether this Court's previous decisions are correct that child pornography statutes defined to include "lewd" or "lascivious" exhibitions of the genitals or pubic area are not unconstitutionally vague or overbroad.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER CIRCUITS OR THIS COURT 8

II. THE COURT'S EARLIER GRANT OF CERTIORARI HAS NO BEARING ON WHETHER CERTIORARI SHOULD BE GRANTED A SECOND TIME 10

III. THE COURT OF APPEALS WAS CORRECT AS A MATTER OF LAW ON EVERY DISPUTED ISSUE 13

A. The Court Below Correctly Interpreted The Statute 13

B. Applying The Statute To Lascivious Exhibitions Where Genitalia Are Covered And Not Discernable Does Not Render It Unconstitutional 16

TABLE OF AUTHORITIES

Cases **Page**

Banco Nacional de Cuba v. First National City Bank of New York,
270 F. Supp. 1004 (S.D.N.Y. 1967),
rev'd 431 F.2d 394 (2d Cir. 1970),
vacated and remanded, 400 U.S. 1019 (1971),
on remand, 442 F.2d 530 (2d Cir. 1971),
rev'd, 406 U.S. 759 (1972) 12

Batson v. Kentucky,
476 U.S. 79 (1986) 8

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 16, 17

Chappell v. United States,
878 F.2d 384 (7th Cir. 1989),
vacated and remanded, 494 U.S. 1075 (1990),
dismissal of habeas corpus aff'd,
956 F.2d 272 (7th Cir. 1992),
cert. denied, 112 S.Ct. 1986 (1992),
reh'g denied, 112 S.Ct. 3061 (1992) 11

City of Chicago v. Environmental Defense Fund,
114 S.Ct. 1588 (1994) 13

Colgate-Palmolive-Peet Co. v. National Labor Relations Board,
338 U.S. 355 (1949) 16

Evans v. United States, 113 F.2d 935 (10th Cir. 1940),
vacated and remanded, 312 U.S. 651 (1941),

Cases **Page**

on remand, 122 F.2d 461 (10th Cir. 1941),
cert. denied, 314 U.S. 698 (1942) 11

Gentile v. State Bar of Nevada,
111 S.Ct. 2720 (1991) 17

Grayned v. City of Rockford,
408 U.S. 104 (1972) 17

Hamling v. United States,
418 U.S. 87 (1974) 17

United States v. Knox,
114 S. Ct. 375 (1993). 6

Knox v. United States,
113 S.Ct. 2926 (1993) 5

McCray v. New York,
461 U.S. 961 (1983) 8

Miller v. California,
93 S.Ct. 2607 (1973) 9

Murray v. United States,
333 F.2d 409 (10th Cir. 1964),
vacated and remanded, 380 U.S. 527 (1965),
on remand, 351 F.2d 330 (10th Cir. 1965),
cert. denied, 383 U.S. 949 (1966) 11

New York v. Ferber,
458 U.S. 747 (1982) 7, 9, 17

Cases **Page**

Osborne v. Ohio,
495 U.S. 103, *reh'g denied*,
486 U.S. 913 (1990) 7,17

Parker v. Levy,
417 U.S. 733 (1974) 17

Perrin v. United States,
444 U.S. 37 (1992) 15

Pope v. United States,
372 F.2d 710 (8th Cir. 1967),
vacated and remanded, 392 U.S. 651 (1968),
on remand, 397 F.2d 812 (8th Cir. 1968),
appeal after remand, 434 F.2d 325 (8th Cir. 1970),
cert. denied, 401 U.S. 949 (1971) 11

Roth v. United States,
354 U.S. 476, *reh'g denied*,
355 U.S. 852 (1957) 17

Sinclair Refining Co. v. Atkinson,
370 U.S. 195 (1962), *overruled on other grounds*,
Boys Market, Inc. v. Retail Clerks Union,
398 U.S. 235 (1970) 15-16

United States v. Al Kashif,
930 F.2d 35 (10th Cir. 1991),
vacated and remanded, 112 S.Ct. 412 (1991),
aff'd, 951 F.2d 1261 (10th Cir. 1991),
cert. denied, 112 S.Ct. 1597 (1992) 11

United States v. Arvin,
900 F.2d 1385 (9th Cir. 1990),
cert. denied, 498 U.S. 1024 (1991) 9

Cases **Page**

United States v. Beasley,
519 F.2d 233 (5th Cir. 1975),
vacated and remanded, 425 U.S. 956 (1976),
on remand, 535 F.2d 293 (5th Cir. 1976),
appeal after remand, 576 F.2d 626 (5th Cir. 1978),
cert. denied, 440 U.S. 947 (1979) 11

United States v. Dost,
636 F. Supp. 828 (S.D. Cal. 1986),
aff'd sub. nom. United States v. Weigand,
812 F.2d 1239 (9th Cir.), *cert. denied*,
484 U.S. 856 (1987) 8, 9

United States v. Gaines,
441 F.2d 1122 (2d Cir. 1971),
vacated and remanded, 404 U.S. 878 (1971),
on remand, 460 F.2d 176 (2d Cir. 1972),
cert. denied, 409 U.S. 883 (1972) 12

United States v. Gilbert,
537 F.2d 118 (5th Cir. 1976),
vacated and remanded, 430 U.S. 902 (1977),
rev'd in part, 553 F.2d 990 (5th Cir. 1977),
appeal after remand, 573 F.2d 346 (5th Cir. 1978),
cert. denied, 439 U.S. 913 (1978) 11

United States v. Graham,
521 F.2d 812 (5th Cir. 1975),
vacated and remanded sub. nom.
Riggins v. United States, 425 U.S. 956 (1976),
on remand, 563 F.2d 1264 (5th Cir. 1977),
cert. denied, 439 U.S. 848 (1978) 11

Cases **Page**

United States v. Haddad,
571 F.2d 583 (6th Cir. 1977),
vacated and remanded, 434 U.S. 1057 (1978),
on remand, 587 F.2d 12 (6th Cir. 1978),
cert. denied, 439 U.S. 1132 (1979) 11

United States v. Ketola,
455 F.2d 83 (9th Cir. 1972),
vacated and remanded, 409 U.S. 815 (1972),
on remand, 478 F.2d 64 (9th Cir. 1973),
cert. denied, 414 U.S. 847 (1973) 11

United States v. Knox,
32 F.3d 733 (3d Cir. 1994) 7, 14, 15

United States v. Knox,
776 F. Supp. 174 (M.D. Pa. 1991) 3

United States v. Knox,
977 F.2d 815 (3rd Cir. 1992) 2, 5, 14-16

United States v. McCormick,
675 F. Supp. 223 (M.D. Pa. 1987) 14

United States v. Mr. A.,
756 F. Supp. 326 (E.D. Mich. 1991) 9

United States v. Nolan,
818 F.2d 1015 (1st Cir. 1987) 9

United States v. Petty,
798 F.2d 1157 (8th Cir. 1986),
vacated and remanded, 481 U.S. 1034 (1987),
rev'd and remanded, 828 F.2d 2 (8th Cir. 1987),
cert. denied, 486 U.S. 1057 (1988) 11

Cases **Page**

United States v. Rubin,
559 F.2d 975 (5th Cir. 1977),
vacated and remanded, 439 U.S. 810 (1978),
aff'd in part, rev'd and remanded in part,
591 F.2d 278 (5th Cir. 1979),
cert. denied, 444 U.S. 864 (1979) 11

United States v. Rubio,
834 F.2d 442 (5th Cir. 1987) 9

United States v. Stanley,
427 F.2d 1066 (9th Cir.),
vacated and remanded,
400 U.S. 936 (1970), *on remand*,
446 F.2d 347 (9th Cir.), cert. denied,

404 U.S.996 (1971) 10, 12

United States v. Williams,
916 F.2d 714 (6th Cir. 1990),
vacated and remanded, 500 U.S. 901 (1991),
aff'd, 949 F.2d 220 (6th Cir. 1991),
cert. denied, 112 S.Ct. 2308 (1992) 12

United States v. Wolf,
890 F.2d 241 (10th Cir. 1989) 9

Statutes

18 U.S.C. 2252(a)(2) & (4)(B). 2

18 U.S.C. § 2252 14

Cases

Page

18 U.S.C. § 2256 14

18 U.S.C. § 2256(2) 15

18 U.S.C. § 2256(2)(E) 4, 9

Pub. L. No. 98-292, § 2 13

Legislative History

S. Rep. No. 1011, 95th Cong., 2d Sess. (1977) 15

Miscellaneous

Black's Law Dictionary (6th ed. 1990) 15

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BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS IN OPPOSITION TO CERTIORARI

INTEREST OF AMICI CURIAE

With the written consent of the parties, this brief is filed on behalf of "Amici Members of Congress," the 238 United States Senators and Representatives and the two Representatives-Elect listed in Appendix A. As parents, community leaders, and legislators, each of the 240 Amici Members has furthered and benefited from federal policies aimed at eliminating child pornography from our society. The Amici Members coalesced as a group when it became apparent that the Department of Justice was unwilling to prosecute pedophiles caught using certain types of child pornography. The core question at issue, as identified by the court of appeals, is whether federal child pornography laws are to be read "to

create an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered." *United States v. Knox*, 977 F.2d 815, 823 (3rd Cir. 1992). Starting with their brief before this Court and continuing in the proceedings on remand, the Justice Department favored a form of such immunity. By contrast, the Amici Members of Congress consistently have opposed making any exception for lascivious exhibitions of barely covered genitals.

On remand from this Court, the Justice Department, while unwilling to drop its case against petitioner Knox, still declined to prosecute it vigorously. The court of appeals responded by ordering participation in oral argument by counsel for Amici Members of Congress, as the spokesperson for the various amici who urged affirmance of defendant Knox's conviction. Of the positions presented at argument—Knox's, the Department's, and that of the Amici Members—only the Amici Members' was adopted by the court. Should this Court grant certiorari despite this Brief in Opposition, the Amici Members will solicit leave of the Court to serve again as surrogate prosecutors in the same manner as in the proceedings below.

STATEMENT OF THE CASE

Petitioner Stephen A. Knox (petitioner or Knox) is a repeat offender under the child pornography laws. Convicted once before of receiving child pornography, he was convicted again in this case on one count of knowingly receiving through the mail visual depictions of a minor engaging in sexually explicit conduct, and a second count of knowingly possessing such visual depictions. *See* 18 U.S.C. 2252(a)(2) & (4)(B). After a bench trial, the district court sentenced Knox to concurrent terms of five years imprisonment on each count.

The facts in this case are not in dispute. In March 1991, the U.S. Customs Service intercepted an order from a French company for two videos, "Little Girl Bottoms (Underside)" and "Little Blonds." The order requested that the videos be sent to

"J. Richard Scott," to be paid for by a check drawn on an account belonging to Knox. That same month, the Customs Service intercepted a mailing addressed to J. Richard Scott from the Netherlands containing a catalog advertising videotapes depicting minors who were nude and seminude. The Customs Service, aware that Knox previously had been convicted of receiving child pornography, obtained a search warrant and conducted a search of Knox's apartment.

Agents thereupon seized the three videotapes which ultimately formed the basis for Knox's conviction. The videotapes, each around 90 minutes in length, were compilations of videos sold by the Nather Company of Las Vegas. They depicted girls as young as 7 or 8 years old, typically wearing bathing suits or leotards, or spreading their legs so that their panties were visible under a short skirt. The district court was able to describe the tapes graphically after viewing only short portions of them: "In each vignette the subject of the video would strike various poses which were obviously being directed by someone off-camera. Whenever a particular pose revealed the girl[']s underpants or the area surrounding her genitals, the camera would zoom in on the area. In the course of each vignette, more than a substantial amount of time was spent focusing in on these areas, as well as the girl's buttocks." *United States v. Knox*, 776 F. Supp. 174, 179 (M.D. Pa. 1991).

While none of the girls in the videotapes was actually nude, they were directed to strike obviously unnatural and physically uncomfortable poses. For instance, in one segment, a girl who appears to be about 8 years old is standing on a stairway wearing nothing but a tight bikini bathing suit. She is facing down the stairs, toward the camera, which is positioned at the bottom of the stairs. Apparently at the direction of someone off camera, she stretches her left leg high enough to place it on the bannister. The camera then zooms in on her genital area, which remains the camera's exclusive focus for an extended period of time .

In another representative segment, two little girls are sitting on a wooden bench. They are wearing plaid skirts and blouses. One of the girls turns sideways on the bench and pulls her knees up to her chest. The photographer, apparently by lowering the camera to the floor and shooting up, videotapes long segments where nothing is visible except the child's panties, focusing on her pubic area. Because of the awkward position and angle of the camera, the child must have been aware of the focus of the shot—that only her genital area and not the girl herself was being videotaped.

While petitioner goes to great lengths trying to claim that these materials contain nothing but wholesome, everyday depictions of little girls, a more apt description is found in a catalog from the Nather Company, seized from petitioner's apartment with checkmarks (presumably petitioner's) noting several of the videotape selections:

> "Sassy Sylphs" will blow your mind so completely you'll be begging for mercy.
>
> Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better).

United States v. Knox, 32 F.3d at 738.

Based on videotapes meeting this description, Knox was charged with receiving and possessing child pornography in violation of 18 U.S.C. 2252. He moved unsuccessfully to dismiss the indictment before trial on the ground that the videos did not contain a "lascivious exhibition" of the "genitals or pubic area" as required by 18 U.S.C. § 2256(2)(E).

Before the Third Circuit, Knox again argued that his conviction should be overturned because the children in the

videos were not actually nude. The court of appeals, "declin[ing] to create an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered," rejected Knox's argument. 977 F.2d at 823. Specifically, the court held that the statutory text and legislative history both convincingly demonstrate that "exhibition" encompasses conduct which "present[s] to view" or "put[s] on display in order to attract notice." 977 F.2d at 820. The court found that this standard was met easily where "the obvious purpose and inevitable effect of the videotape was to 'attract notice' specifically to the genitalia and pubic area." *Id.* The legislative history reinforced the court's conclusion that the child's pubic area does not have to be nude to be "exhibited". By including and then eliminating the word "nudity" from the statutory text, the court reasoned that Congress had demonstrated its intent to repudiate any such limitation. 977 F.2d at 821.

Finally, the court emphasized that the "underlying rationale for the federal child pornography laws also supports the conclusion that clothed exhibitions of the genitalia are proscribed." *Id.* The court recognized that "[t]he harm Congress attempted to eradicate by enacting the child pornography laws," *i.e.*, treating children as sexual objects and risking their permanent emotional scarring, "is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles." The court concluded that the "rationale underlying the statute's proscription applies equally to any *lascivious* exhibition of the genitals or pubic area whether these areas are clad or completely exposed." 977 F.2d at 822.

On certiorari, Knox renewed his contention that only nude depictions may be prosecuted, and this Court granted his petition. *Knox v. United States*, 113 S.Ct. 2926 (1993). While Knox's case was before the Court, the Department of Justice radically changed its position, much to the dismay of the Amici

Members of Congress and the public who overwhelmingly support vigorous enforcement of the child pornography laws. Thus, despite having brought Knox's indictment, secured his conviction, defended that conviction before the court of appeals, and opposed certiorari, the Department's brief on the merits adopted an interpretation strikingly similar to the one Knox himself had taken from the outset. Citing the statute's "plain meaning," the Department argued that its reach must be limited to exhibitions which "focus on [the genitals]" and "render them visible," in the sense "that the body parts themselves [are] discernible either through or beneath the clothing." (Resp. S. Ct. Br. I at 9-11) Arguably going even beyond Knox's position, the Department further maintained that "the material must depict a *child lasciviously engaging* in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)." (*Id.* at 9) (emphasis added)

On the basis of its newly-minted interpretation, the Department requested that the Court remand either to the court of appeals or to the district court "for application . . . of the correct standard to the facts of this case." (*Id.* at 20) This Court granted the Department's request on November 1, 1993, and remanded to the court of appeals "for further consideration in light of the position asserted by the Solicitor General." *United States v. Knox*, 114 S. Ct. 375 (1993).

On remand, the Department first sought a further remand to the district court. When the court of appeals ordered full briefing instead of the requested remand, the Department partially backed away from the position advocated in its Supreme Court merits brief. While still maintaining that the statute proscribes only depictions where "the contours of the genital area are clearly visible," Gov't brief on remand at 13, it withdrew the second element of the test that it announced before this Court—specifically, that the child must be acting lasciviously. The incongruity of the Department's discernability requirement ultimately forced its counsel to

concede at oral argument in the court of appeals that "little girls [would be] at more of a risk than little boys under its interpretation." Tr. at 39.

The court of appeals reconsidered on remand all of the issues that had been raised in the initial appeal, as well as the additional questions presented by the Justice Department. The Amici Members of Congress figured prominently both in briefing and oral argument before the court of appeals.

In another lengthy opinion, the court of appeals unanimously affirmed Knox's conviction. *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994). The court rejected both Knox's "nudity" requirement and the Justice Department's "discernability" requirement after giving further consideration to "the statutory language, legislative history, the purpose of Congress in passing the federal child pornography statute, and the Solicitor General's brief submitted in the Supreme Court." *Id.* at 754. In the court's view, a 'lascivious exhibition of the genitals or pubic area' . . . encompasses visual depictions of a child's genitals or pubic area even when these areas are covered by an article of clothing and are not discernable." The court also addressed and rejected petitioner's constitutional attacks on the statute. *Id.* at 751-52.

REASONS FOR DENYING THE WRIT

Notwithstanding the contrary implication in Knox's Petition (*see* Cert. Pet. II at 9), the previous grant of certiorari should not influence the Court's decision whether to grant certiorari a second time. There is no conflict among the circuits regarding either the Third Circuit's holding or its interpretation of the child pornography laws. Nor are there any other bases on which review should be granted. The statute, as interpreted by the Third Circuit, is constitutional in light of this Court's decisions in *New York v. Ferber*, 458 U.S. 747 (1982) and *Osborne v. Ohio*, 495 U.S. 103 (1990) and petitioner Knox was properly convicted on the evidence presented.

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER CIRCUITS OR THIS COURT.

The traditional grounds for granting certiorari are entirely absent here. There is no disagreement among the circuits on the question presented. Indeed, no other court of appeals has even considered—much less contradicted—the Third Circuit's statutory analysis. The petition for certiorari not only admits but trumpets this conclusion: "[t]he fact remains that Petitioner Knox is the only person ever to be convicted for receiving and possessing depictions of minors whose genitals and pubic areas are fully covered . . .." *See* Cert. Pet. II at 10.

Even where the Court appreciates "the importance of the underlying issues," it is often "a sound exercise of discretion" for it to withhold review until an "issue receives further study" in the lower courts. *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.). Justice Stevens' admonition in *McCray*, prompted by the Court's denial of review in three cases presenting the issue eventually decided in *Batson v. Kentucky*, 476 U.S. 79 (1986), applies *a fortiori* here. Surely plenary review by this Court aimed at defining the reach of the term "lascivious exhibition" is not so important as the systemic issue posed in *McCray* and *Batson*—whether jurors in criminal cases may be excluded by preemptory challenge on the basis of race. Moreover, the trio of cases on which review was denied in *McCray* necessarily contained more varied perspectives on the relevant issues than does the single unanimous opinion that petitioner would have the court review in this case.

Petitioner's one attempt to discern a conflict of sorts turns solely on the Third Circuit's application of the factors bearing on "lascivious exhibition," first announced in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub. nom. United States v. Weigand*, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987) (emphasis added). *See* Cert.

Pet. II at 18-20. But there is no conflict among the circuits on the *Dost* factors; instead, every circuit that has considered the issue seems to accept them. *See, e.g., United States v. Arvin*, 900 F.2d 1385, 1390-91 & n.4 (9th Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991); *United States v. Wolf*, 890 F.2d 241, 244-46 (10th Cir. 1989); *United States v. Rubio*, 834 F.2d 442, 448 (5th Cir. 1987) (discussing the six *Dost* factors without citing to the *Dost* case); *United States v. Nolan*, 818 F.2d 1015, 1019 n.5 (1st Cir. 1987); *United States v. Mr. A.*, 756 F. Supp. 326, 328-29 (E.D. Mich. 1991). Petitioner's claim that the Third Circuit applied the factors in the context of deciding what constitutes an "exhibition" rather than a "lascivious exhibition" is a distinction without a difference.

Moreover, the *Dost* factors applied by the Third Circuit and other courts are entirely appropriate under this Court's decisions. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court recognized that the purpose of child pornography statutes prohibiting "actual or simulated . . . lewd exhibition of the genitals" is to protect children from permanent damage to their "physiological, emotional, and mental health." *Id.* at 758, 761. Recognizing this special concern, the Court held that the material in question need not be obscene under *Miller v. California*, 93 S.Ct. 2607 (1973), *Ferber* at 756, and that, in determining which materials are proscribed, a balancing of considerations is constitutionally permissible. *Id.* at 764-765. *Dost* simply follows *Ferber* by enunciating six factors to guide the determination of whether a visual depiction constitutes a "lascivious exhibition of the genitals or pubic area." *See* 18 U.S.C. § 2256(2)(E). Since there is no conflict over the application of those factors, and since they are constitutionally permissible under this Court's decisions, there is no basis for granting certiorari here.

II. THE COURT'S EARLIER GRANT OF CERTIORARI HAS NO BEARING ON WHETHER CERTIORARI SHOULD BE GRANTED A SECOND TIME.

There is no basis for a presumption that certiorari should be granted again simply because the Court previously granted review. Indeed, our research shows that this Court generally has denied second petitions for certiorari on the same issue after remand of criminal cases at the suggestion of the Solicitor General. To be sure, cases where the lower court squarely addressed the remanded issue and reaffirmed on the same or similar grounds are extremely rare. But where that occurred, the Court has not hesitated to deny certiorari when the case comes to it a second time. *See United States v. Stanley*, 427 F.2d 1066 (9th Cir.), *vacated and remanded*, 400 U.S. 936 (1970), *on remand*, 446 F.2d 347 (9th Cir. 1971).

Counsel for the Amici Members performed a computerized search of cases pending before the Court but subsequently remanded either at the suggestion of the Solicitor General, or because the Solicitor General changed his legal position. Without any claim that our research is perfect or our search exhaustive, the results are nonetheless instructive.

Instances where a second petition for certiorari was filed *on any issue* after remand for reconsideration in light of the Solicitor General's changed position are themselves relatively rare. Between 1930 and November 1, 1993 (the date of remand to the Third Circuit here), the Court vacated and remanded approximately 125 cases in response to a suggestion or a confession of error by the Solicitor General. Most of the remanded cases were criminal. In sixteen such cases, a second petition for certiorari was filed following remand to the lower court. Fifteen of these sixteen cases were criminal. And in all fifteen criminal cases, the second petition for certiorari was denied.

In twelve of the fifteen criminal cases where a second petition was filed, the issue was resolved, or the error corrected

in favor of the petitioner (uniformly the criminal defendant).[1] Consequently, in each of these twelve cases, the second petition for certiorari did not involve the same issue or issues on which certiorari had previously been granted.

In the remaining three criminal cases, the second petition for certiorari *did* involve the same issue or issues. But in two of those three cases, the court of appeals affirmed its previous decision by means that did not address precisely the

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[1] *United States v. Al Kashif*, 930 F.2d 35 (10th Cir. 1991), *vacated and remanded*, 112 S.Ct. 412 (1991), *aff'd*, 951 F.2d 1261 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1597 (1992); *Chappell v. United States*, 878 F.2d 384 (7th Cir. 1989), *vacated and remanded*, 494 U.S. 1075 (1990), *dismissal of habeas corpus aff'd*, 956 F.2d 272 (7th Cir. 1992), *cert. denied*, 112 S.Ct. 1986 (1992), *rehearing denied*, 112 S.Ct. 3061 (1992); *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986), *vacated and remanded*, 481 U.S. 1034 (1987), *rev'd and remanded*, 828 F.2d 2 (8th Cir. 1987), *cert. denied*, 486 U.S. 1057 (1988); *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *aff'd in part, rev'd and remanded in part*, 591 F.2d 278 (5th Cir. 1979), *cert. denied*, 444 U.S. 864 (1979); *United States v. Haddad*, 571 F.2d 583 (6th Cir. 1977), *vacated and remanded*, 434 U.S. 1057 (1978), *on remand*, 587 F.2d 12 (6th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *United States v. Gilbert*, 537 F.2d 118 (5th Cir. 1976), *vacated and remanded*, 430 U.S. 902 (1977), *rev'd in part*, 553 F.2d 990 (5th Cir. 1977), *appeal after remand*, 573 F.2d 346 (5th Cir. 1978), *cert. denied*, 439 U.S. 913 (1978); *United States v. Beasley*, 519 F.2d 233 (5th Cir. 1975), *vacated and remanded*, 425 U.S. 956 (1976), *on remand*, 535 F.2d 293 (5th Cir. 1976), *appeal after remand*, 576 F.2d 626 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979); *United States v. Graham*, 521 F.2d 812 (5th Cir. 1975), *vacated and remanded sub. nom. Riggins v. United States*, 425 U.S. 956 (1976), *on remand*, 563 F.2d 1264 (5th Cir. 1977), *cert. denied*, 439 U.S. 848 (1978); *United States v. Ketola*, 455 F.2d 83 (9th Cir. 1972), *vacated and remanded*, 409 U.S. 815 (1972), *on remand*, 478 F.2d 64 (9th Cir. 1973), *cert. denied*, 414 U.S. 847 (1973); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), *vacated and remanded*, 392 U.S. 651 (1968), *on remand*, 397 F.2d 812 (8th Cir. 1968), *appeal after remand*, 434 F.2d 325 (8th Cir. 1970), *cert. denied*, 401 U.S. 949 (1971); *Murray v. United States*, 333 F.2d 409 (10th Cir. 1964), *vacated and remanded*, 380 U.S. 527 (1965), *on remand*, 351 F.2d 330 (10th Cir. 1965), *cert. denied*, 383 U.S. 949 (1966); *Evans v. United States*, 113 F.2d 935 (10th Cir. 1940), *vacated and remanded*, 312 U.S. 651 (1941), *on remand*, 122 F.2d 461 (10th Cir. 1941), *cert. denied*, 314 U.S. 698 (1942).

issue which this Court previously had remanded at the suggestion of the Solicitor General. In *United States v. Gaines*, for example, this Court had remanded to the court of appeals to consider the validity of an arrest and search, but the lower court applied the concurrent sentence doctrine to hold that it was not required to reach that issue.[2] In the second case, *United States v. Williams*, this Court remanded for reconsideration on the issue of the standard of review to be applied in a probable cause determination.[3] The court of appeals held on remand that it was bound by circuit precedent, but that, in any event, changing the standard of review would not change the outcome.

In the final case, *United States v. Stanley, supra*, the lower court (like the Third Circuit here) squarely addressed and reaffirmed its previous decision on the remanded legal issue—in *Stanley*, whether consecutive sentences for possession and manufacture of LSD were permissible. The Court in *Stanley* denied the subsequent certiorari petition without explanation, 404 U.S. 996 (1971), *reh'g denied*, 406 U.S. 911 (1972). This is the sole, on-all-fours precedent uncovered by Amici Members' research, but it is surely enough to defeat petitioner's implicit suggestion that a second certiorari petition on the same issue will be granted as a matter of course.[4]

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[2] *United States v. Gaines*, 441 F.2d 1122 (2d Cir.), *vacated and remanded*, 404 U.S. 878 (1971), *on remand*, 460 F.2d 176 (2d Cir. 1972), *cert. denied*, 409 U.S. 883 (1972).

[3] *United States v. Williams*, 916 F.2d 714 (6th Cir. 1990), *vacated and remanded*, 500 U.S. 901 (1991), *aff'd*, 949 F.2d 220 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 2308 (1992).

[4] In two civil cases—one within the date parameters of our search and one outside them—this Court granted a second petition. In *Banco Nacional de Cuba v. First National City Bank of New York*, where the court of appeals squarely addressed the remanded legal issue and affirmed its previous decision on the same grounds, this Court granted a second petition for certiorari. 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd* 431 F.2d 394 (2d Cir.

(continued...)

III. THE COURT OF APPEALS WAS CORRECT AS A MATTER OF LAW ON EVERY DISPUTED ISSUE.

As demonstrated above, none of the traditional bases for certiorari apply here. Nor should the Court's prior grant of review influence the decision whether to grant review a second time. The following discussion summarizes briefly why no injustice will result if certiorari is denied.

A. The Court Below Correctly Interpreted The Statute.

The court of appeals correctly decided every disputed legal issue, both in its initial opinion and on reconsideration after remand from this Court. As the court observed during the oral argument on remand, "at the heart of the case is the question as to whether or not the statute requires or does not require nudity." As its title indicates, the Protection of Children Against Sexual Exploitation Act was expressly designed to promote the welfare of children by protecting them from the permanent emotional scarring that can result from being sexually exploited. Pub. L. No. 98-292, § 2(2), (3), ("thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and the use of children as subjects of pornographic materials is harmful to the physiological,

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[4] (...continued)
1970), *vacated and remanded*, 400 U.S. 1019 (1971), *on remand*, 442 F.2d 530 (2d Cir. 1971), *rev'd*, 406 U.S. 759 (1972) (at issue was whether the act of state doctrine bars consideration of a defensive counterclaim or offset). Similarly, last Term the Court decided *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1589 (1994), a case which it had earlier remanded to the court of appeals after the EPA issued a memorandum directing EPA administrators to treat certain waste at issue as exempt from regulation, a position that, if adopted by the Court, would have been dispositive. On remand the court of appeals reinstated its previous opinion, holding that the material was subject to regulation, notwithstanding the EPA's position, and this Court again granted certiorari.

emotional, and mental health of the individual child and to society"). The court below recognized that whether a child is clothed or unclothed has little bearing on the emotional scarring and psychological harm inflicted on a child who is victimized through pornographic exploitation. *See* 32 F.3d at 750 ("when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles [t]he child is treated as a sexual object and the permanent record of this embarrassing and humiliating experience produces the same detrimental effects to the mental health of the child as a nude portrayal.")

The mental scarring of children that the statute was intended to prevent takes place whenever children are made to see themselves as pedophiles see them—as mere sexual objects who exist to provide sexual pleasure to adults. That exploitation and eroticization does not depend on whether the child is naked, partially clothed, or clothed with "discernable parts." *See, e.g., United States v. McCormick*, 675 F. Supp. 223, 224 (M.D. Pa. 1987) (photos of a *partially clothed* girl constituted an "exhibition" under 18 U.S.C. § 2252 and 18 U.S.C. § 2256 where the "pictures featured the child photographed as a sexual object. . . . [L]asciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience. . ..")

Nor is nudity or discernability required to implicate Congress's other concern in enacting the statute: ending the exploitation of children who are forced *to view* child pornography. As the Third Circuit noted, Congress judged that only by "controlling the production and dissemination of child pornography" would it be possible to curb the behavior of "pedophiles [who] often use child pornography to seduce other children into performing sexual acts." 977 F.2d 822. This objective can be achieved only by outlawing *all* depictions of children in which "a photographer unnaturally focuses on a

minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles." *Id.*

Significantly, Congress extended the definition of "lascivious exhibition of the genitals or pubic area" to include "actual *or simulated*" lascivious exhibitions. 18 U.S.C. § 2256(2) (emphasis added). The plain implication of this language (a "simulated lascivious exhibition") substantially broadens the practical reach of the statute, and demonstrates Congress's intent that the statute proscribe *all types* of exhibitions, not just those that are graphic, explicit, or nude.

Further, the plain meaning of the term "exhibit" confirms that the statute reaches exhibitions of clothed genitalia. In drafting laws, Congress is presumed to speak as a natural English speaker would, and its words are to be given the interpretation that they would be given in common, everyday conversation. *Perrin v. United States*, 444 U.S. 37, 42 (1992). As the court of appeals recognized, "[i]n ordinary legal usage, the word 'exhibit' means 'to show or display; to offer or present for inspection.' The genitals . . . need not be fully or partially nude in order to be shown or put on display." 32 F.3d at 744, *citing* Black's Law Dictionary at 573 (6th ed. 1990). Had Congress wanted to proscribe only nude or discernable depictions, it presumably would have chosen a phrase that accurately reflected that purpose, such as "lascivious *exposure* of the genitals."

Finally, the legislative history reinforces Congress's purpose and the plain meaning of the words it chose. In enacting this legislation, Congress explicitly considered—and then rejected—a provision which would have proscribed only nude depictions of children. *See* S. Rep. No. 1011, 95th Cong., 2d Sess. (1977). Congress's failure to use a particular word after that word was deliberately considered and then passed over, as the word "nudity" was in this case, indicates a specific intention to abandon that word in favor of another. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 205-206 (1962), *overruled on other grounds, Boys Market, Inc. v. Retail Clerks*

Union, 398 U.S. 235, 254 (1970) (congressional purpose evident where the legislative history showed that Congress actually considered certain language and that the language was "dropped" and never became law); *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U.S. 355, 363 (1949) (argument based on omitted wording rejected on the basis of legislative history). As the Court below has pointed out, "[b]y subsequently eliminating the word 'nudity,' Congress appears to have repudiated its earlier intention to confine the statute's coverage to nude exhibitions." 977 F.2d at 821.

In short, had Congress wished to include a nudity requirement in the Protection of Children Against Sexual Exploitation Act, it could have easily done so by retaining the word "nudity" or by employing "expose" instead of "exhibit." The Act's legislative history demonstrates that such provisions were consciously omitted by Congress because the Act was designed to prevent the sexual exploitation of children, whatever form it might take, and in whatever state of dress or undress a child might appear.

B. Applying The Statute To Lascivious Exhibitions Where Genitalia Are Covered And Not Discernable Does Not Render It Unconstitutional.

Knox contends that by construing the statute to reach clothed exhibitions of the genital or pubic area, it is rendered facially overbroad or unconstitutionally vague. (Cert. Pet. II at 26-30) Under this Court's established guidelines, however, the statute is neither facially vague or overbroad nor vague as applied to prohibit lascivious exhibitions of clothed genital or pubic areas.

In order to invalidate a statute on overbreadth grounds, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 614-615 (1973). Further, in determining whether a statute is

overbroad, authoritative pronouncements determining the breadth of the statute must be considered. *Id.* at 618.

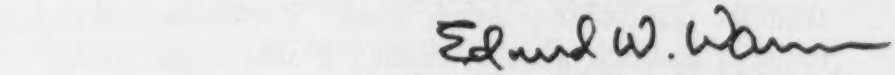
This Court has upheld statutes with virtually identical language against claims of overbreadth. *See New York v. Ferber*, 458 U.S. at 771, 772-773 (law prohibiting the "lewd exhibition of the genitals" of children not unconstitutionally overbroad; requirement of substantial overbreadth extends to criminal prohibitions, and a facial overbreadth challenge requires that the statute "reach[] a substantial number of impermissible applications."); *Osborne v. Ohio*, 495 U.S. 103, 113, *reh'g denied*, 486 U.S. 913 (1990) (statute that had been construed to prohibit "a lewd exhibition or . . . graphic focus on the genitals" not unconstitutionally overbroad).

Nor is the statute unconstitutionally vague. In determining whether statutes are facially vague, this Court's decisions look to whether the statute sets reasonably clear guidelines for law enforcement officials and triers of fact, as well as provides fair notice or warning regarding what conduct is prohibited. *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2731 (1991); *Parker v. Levy*, 417 U.S. 733, 752 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972). While obscenity statutes unavoidably are not models of precision, that "lack of precision is not itself offensive to the requirements of due process." *Roth v. United States*, 354 U.S. 476, 491, *reh'g denied*, 355 U.S. 852 (1957) (interpreting the phrase "obscene, lewd, lascivious, or filthy"); *Hamling v. United States*, 418 U.S. 87, 112 (1974) (the phrase "obscene, lewd, lascivious, indecent, filthy or vile"). "[A]ll that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." *Roth, supra*, at 491.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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Dated: November 10, 1994

APPENDIX

APPENDIX A

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